

**KONTRON ASIA PACIFIC DESIGN SDN BHD & ANOR
v. QUAH SIN CHYE & ORS AND ANOTHER APPEAL**

HIGH COURT MALAYA, PULAU PINANG
HADHARIAH SYED ISMAIL J
[SUITS NO: 22-714-2010 & 22-710-2010]
20 JUNE 2018

COMPANY LAW: Director – Breach of fiduciary duties – Allegation that directors involved in fictitious transactions – Failure to follow procedure set out in company's contract formation policy – Whether business carried out in irregular, abnormal and nonsensical way – Whether directors grossly negligent – Whether caused losses to company – Whether company knew of fictitious transactions – Whether directors liable to make good losses suffered by company

COMPANY LAW: Director – Liability of directors – Breach of fiduciary duties – Allegation that directors involved in fictitious transactions – Failure to follow procedure set out in company's contract formation policy – Whether business carried out in irregular, abnormal and nonsensical way – Whether directors grossly negligent – Whether caused losses to company – Whether company knew of fictitious transactions – Whether directors liable to make good losses suffered by company

TORT: Conspiracy – Conspiracy to injure – Elements of – Breach of fiduciary duties by company directors – Allegation that directors involved in fictitious transactions – Whether business carried out in irregular, abnormal and nonsensical way – Whether resulted in loss and damages to company – Whether directors grossly negligent – Whether case of tort of conspiracy to injure established

The two actions herein, suit 710 and suit 714, were taken by the company, the plaintiffs, against the defendants who were the directors, customers, supplier and manufacturer, for the losses suffered as a result of fictitious transaction schemes carried out by the defendants. The plaintiffs' cause of action against the first defendant in suit 714 ('Dr Sam') and the defendant in suit 710 ('CG Quah') was for negligence and breach of fiduciary duty in discharging their duties to the company. As against the other defendants in suit 714, the plaintiffs' cause of action was that they had conspired to injure the plaintiffs by unlawful means. The second defendant ('WBC'), the third defendant ('USP') and the fourth defendant ('NEE') were the customers of KDMS, the first plaintiff in suit 714. KDMS was a subsidiary of Kontron AG, a public listed company in Germany. The seventh defendant and eighth defendant ('SG Lim') were the directors and shareholders of WBC. The fifth defendant ('TSLK'), was a company controlled by SG Lim and was purportedly the supplier for the purchase order made by WBC, USP and NEE. The sixth defendant's ('Synergy') role was to manufacture all the goods

- A and/or products to fulfil the purchase order given by WBC and NEE. KDMS was involved in the business of, among others, manufacturing electronic products and providing service business. Under the service business, KDMS outsourced its manufacturing to third parties, TSLK and Synergy and in this regard, had entered into service business with WBC, USP
- B and NEE. WBC and USP had entered into a technical collaboration agreement with Kontron Manufacturing Services Sdn Bhd ('KMS'). However, there was no written agreement with NEE. To fulfil the orders from NEE, components were purchased by KDMS from TSLK. The products were purportedly to be manufactured by Synergy and delivered to
- C KDMS in order to ship the same to NEE. Arising from the service business, the plaintiffs suffered losses through two transactional schemes *ie*, (i) fictitious transactions scheme where the supply of goods was outsourced to TSLK and the manufacturing of the goods was outsourced to Synergy; and (ii) inventory sale scheme where the credit facility of RM35 million granted by Deutsche Bank to TSLK purportedly to finance the purchase of inventory
- D from KDMS, but was instead used to repay the debt owing by NEE to KDMS. The RM35 million was secured by a guarantee by Kontron AG. These two transaction schemes had caused huge losses to the plaintiffs. The primary issues in this case were: (i) whether the service business and the inventory sale scheme were fictitious transactions; (ii) whether Dr Sam and
- E CG Quah were negligent as well as had breached their fiduciary duties to KDMS; and (iii) whether the second to eighth defendants had conspired to injure the plaintiffs by unlawful means.

Held (holding all defendants liable to plaintiffs):

- F (1) The process of selecting a customer and the formation of a contract is contained in the contract formation policy ('policy'). The procedure to be followed was laid down in para. 7.1.4 of the policy, *inter alia*, the business development personnel was required to first complete the business project authorisation ('BPA') form and submit it to the top
- G management for approval and thereafter, a draft contract agreement would be prepared and reviewed by the management for approval. However, the top management of KDMS did not approve any BPA form with respect of WBC, USP and NEE. Despite that, Dr Sam and CG Quah had signed the WBC agreement and USP agreement. Based on
- H cl. 7.1.4, it was clear that Dr Sam had breached his duties by failing to ensure that the BPA form was completed before he signed the WBC and USP agreement. (paras 26-28)
- I (2) Pursuant to para 7.3.1.2 of the credit control policy, the payment term prescribed for KDMS's customers is within 30 days from the invoice date and in principle, the payment term of net 30 days shall not apply to all customers. Credit term beyond 30 days required approval. Under

- Dr Sam and CG Quah's supervision, KDMS had given its customers, WBC, USP and NEE between 75 days to 90 days credit term without approval. (paras 29 & 30) A
- (3) Dr Sam and CG Quah did not conduct any background check on the customers and supplier. As it turned out, the customers and supplier had no funds and capabilities to support the fictitious transaction scheme. Further, the process in a normal sale and purchase transactions were bypassed or not followed in the transactions involving WBC, USP and NEE. There was no actual delivery of goods and it was all paper transactions to siphon KDMS's money. Based on the irregularities, abnormality and nonsensical way the service business were carried out with WBC, USP and NEE, the transactions were fictitious. (paras 36, 45, 52 & 53) B C
- (4) The plaintiffs' claim for the sum of RM27 million against TSLK was allowed as the payment by the plaintiffs to Deutsche Bank was never intended as a gift. TSLK defaulted obligation to repay the credit facility provided by Deutsche Bank. The sum of money, secured by corporate guarantee issued by Kontron AG, was paid to avoid Kontron AG from being black listed by Deutsche Bank. The plaintiffs were put in unnecessary problems due to the unscrupulous conduct of the defendants and thus, TSLK could not gain benefits from its own wrongdoing. TSLK was therefore liable to repay the sum to the plaintiffs. (paras 56 & 59) D E
- (5) Based on documents, emails, SMS, facts and evidence, it was inescapable that Dr Sam was grossly negligent and had acted in breach of his duties as a CEO and director of KDMS. Dr Sam's negligence was primarily premised on his deliberate omission to comply with the company's policy and procedure. Dr Sam had conducted the business of KDMS in a manner detrimental to the plaintiffs and had breached his fiduciary duties when he (i) approved the purchase orders to TSLK when he knew that there were no real goods produced and delivered by TSLK and Synergy; (ii) authorised payments made to TSLK when he knew the payments were for fictitious transactions; and (iii) procured the transfer of the monies of KDMS paid to TSLK to his personal accounts or to third parties for his own benefit. By his conduct, Dr Sam had breached his fiduciary duty and/or terms of his employment contract. Because of his negligence, breach of duty and misconduct, the plaintiffs had suffered losses. Therefore, he was liable to make good the losses suffered by the plaintiffs. (paras 60-62 & 68) F G H

I

- A (6) The plaintiffs had no knowledge about the fictitious transactions. KDMS and Kontron AG were under the impression that the transactions with WBC, USP, NEE, TSLK and Synergy and the inventory sale scheme were done genuinely and in accordance with the company's policy and procedure. The plaintiffs were the victims of Dr Sam's deceit and thus, Dr Sam's defence that the plaintiff's company was to be blamed must fail. (para 70)
- B
- C (7) CG Quah was one of the top management personnel in KDMS and the custodian of KDMS's money. Despite knowing that there were many irregularities in the purchase orders, invoices, delivery orders and that WBC, USP and NEE had failed to make payments to KDMS, he dared not stop payment to the supplier, TSLK. By his conduct, CG Quah had facilitated the fictitious transaction and was therefore, negligent and had breached his fiduciary duties to the plaintiffs. He was liable for the losses suffered by the plaintiffs. (paras 74 & 78)
- D (8) In order to make out a tort of conspiracy to injure, these four elements must be present: (i) a combination or agreement between two or more individuals; (ii) an intent to injure; (iii) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and (iv) resulting in loss and damages to the claimant. On the facts, Dr Sam and SG Lim were both the mastermind and *alter ego* behind TSLK. There was no doubt that TSLK was used as a vehicle to wipe off the plaintiffs' money. Without Dr Sam having breached his duty to the plaintiffs, there can never be a tort of conspiracy to injure by unlawful means. The plaintiffs had made out a case of tort of conspiracy to injure against all the defendants and accordingly the defendants were all liable to the plaintiffs. (paras 79 & 80)
- E
- F

Case(s) referred to:

- Chop Kim Lee Seng Kee v. Ye0 Kiat Jin* [1955] 1 LNS 19 HC (*refd*)
- Chua Jui Meng v. Hoo Kok Wing & Anor* [2000] 6 CLJ 390 HC (*refd*)
- G *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676 CA (*refd*)
- Drager v. Allison* [1959] SCR 661 (*refd*)
- Ho Kang Peng v. Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 (*refd*)
- Malayan Banking Bhd v. Joseph Vijay Kumar A Arulnathan* [2011] 1 LNS 825 HC (*refd*)
- H *Pan Malaysian Pools Sdn Bhd v. Kwan Tat Thai & Anor And Other Appeals* [2018] 4 CLJ 323 CA (*refd*)
- PlanAssure PAC (formerly known as Patrick Lee PAC) v. Gaelic Inns Pte Ltd* [2007] 4 SLR 513 (*refd*)
- Re Barings plc and Others (No 5)* [1999] 1 BCLC 433 (*refd*)
- I *SA v. Bilta (UK) Limited (in liquidation)* [2015] UKSC 23 (*foli*)
- Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 FC (*refd*)
- Zaharen Hj Zakaria v. Redmax Sdn Bhd & Other Appeals* [2016] 7 CLJ 380 CA (*refd*)

Legislation referred to:

Contracts Act 1950, ss. 70, 71

Evidence Act 1950, s. 114(g)

(Suit No: 22-714-2010)

For the plaintiffs - Jack Yow, Joshua & Kwong Chiew Ee; M/s Rahmat Lim & Partners

For the 1st defendant - RK Nathan & Vinod Kamalanathan; M/s RK Nathan

(Suit No: 22-710-2010)

For the plaintiff - Jack Yow, Joshua & Kwong Chiew Ee; M/s Rahmat Lim & Partners

For the defendant - Lim Aun Phung; M/s Lim, Heng & Co

Reported by S Barathi

JUDGMENT

Hadhariah Syed Ismail J:

Introduction

[1] These two actions were taken by a company against the defendants who are its directors, customers, supplier and manufacturer for the losses it suffered as a result of a fictitious transaction scheme carried out by the defendants. The plaintiffs' cause of action against the defendant in suit 710 and the first defendant in suit 714 is for negligence and breach of fiduciary duty in discharging their duties to the company. As against the other defendants in Suit 714, the plaintiffs' cause of action is they had conspired to injure the plaintiffs by unlawful means. After a lengthy trial, I held the defendants liable to the plaintiffs. I, then ordered all the defendants to pay damages, interest and costs to the plaintiffs. Against my decision, the defendant in suit 710 and the first defendant in suit 714 had appealed to the Court of Appeal. My reasons for the decision is as follows.

The Parties

[2] Kontron Asia Pacific Design Sdn Bhd (KAPDSB) was formerly known as Kontron Design Manufacturing Services (M) Sdn Bhd (KDMS). KDMS changed its name to KAPDSB on 9 July 2012. Since the events in these cases took place when the company is known as KDMS, in my judgment I shall refer the first plaintiff as KDMS. KDMS is a subsidiary of the second plaintiff, Kontron AG. KDMS was incorporated in Malaysia with its registered address at Suite 18.01, 18th Floor, MWE Plaza, No. 8, Lebuhr Farquhar, Georgetown, Pulau Pinang. Its business address is at Plot 554 & 574, Lorong Perusahaan 4, Zon Perindustrian Bebas, Prai, Pulau Pinang. Kontron AG is a public listed company in Germany. Effective 21 August 2017, Kontron AG has transferred all its assets, rights and liabilities to Kontron S & T A.G. The management of KDMS is run by the local people. The German bosses are based in Germany.

A [3] The first defendant in suit 714, Quah Sin Chye, also known as Dr Sam was the former director and President/Chief Executive Officer of KDMS. The defendant in suit 710, Quah Chong Ghee (CG Quah) was the former director and Financial Controller of KDMS.

B [4] The second defendant, World Best City Sdn Bhd (WBC); the third defendant, USP Development Sdn Bhd (USP) and the fourth defendant, North East Electronics Ltd (NEE) were the customers of KDMS. The director and shareholder of WBC are Anuar bin Aziz (the seventh defendant) and Lim Soon Ghee (SG Lim) (the eighth defendant). WBC is a Malaysian company with its registered address at No. 8A, Tingkat 1, Lebuhr Tenggeri 2, Pusat Bandar Seberang Jaya, Pulau Pinang. USP is a Malaysian company having a registered address at 8B, Lorong 24, Taman Patani Jaya, 08000 Sungai Petani, Kedah. USP carries out its business at 33A, Tingkat Satu, Jalan Bertam, Kepala Batas, Pulau Pinang. NEE is a foreign company based in Hong Kong with its registered address at Unit 8, 2/F, International Trade Centre, 11-19 Sha Tsui Road, Tsuen Wan, Hong Kong.

C [5] The fifth defendant, TSLK Enterprise Sdn Bhd (TSLK) is a Malaysian company with its registered and business address at No. 32, Lebuhr Lembah Permai 4, 11200 Tanjung Bunga, Pulau Pinang. TSLK was purportedly the supplier for the purchase orders made by WBC, USP and NEE. TSLK was controlled by SG Lim, the eighth defendant. The sixth defendant, Synergy Hardmetal Technology Sdn Bhd (Synergy) is a Malaysian company with its registered address at 441-3-9 Pulau Tikus Plaza, Jalan Burma, 10350 Pulau Pinang. Synergy business address is at No. 1-3-55, 1-Avenue, Medan Kampung Relau 1, 11900 Bayan Lepas, Pulau Pinang. Synergy's role was to manufacture all the goods and/or products to fulfil the purchase order given by WBC and NEE.

E [6] The seventh defendant, Anuar bin Aziz (Anuar) is an individual with a last known address at 1-13, Summer Blooms, Persiaran Gurney, 10250 Georgetown, Pulau Pinang. Anuar is a director and the majority shareholder of WBC. Anuar also is a director and shareholder in TSLK in 2008, holding 50% share as at 30 September 2008. The eighth defendant, Lim Soon Ghee (SG Lim) is an individual with a last known address at 12, Pesara Lembah Permai 1, 11200 Tanjong Bungah, Pulau Pinang. He is a director and shareholder of TSLK. He is also a director of NEE.

H **Business Relationship**

I [7] The businesses of KDMS are, among others, the manufacture of internet security appliance, server management appliance and design, development and manufacture of PCB assemblies for microprocessor applications, wireless telecommunication products, computers and accessories and acne treatment devices (electronic products). In addition to

manufacturing of electronic products, KDMS also provide a service business. Under the service business, KDMS outsourced its manufacturing to a third parties, TSLK and Synergy. In this regard, KDMS has entered into service business with WBC, USP and NEE. For WBC, WBC has entered into a technical collaboration agreement dated 17 August 2007 with Kontron Manufacturing Services Sdn Bhd (KMS). This agreement was assigned to KDMS by way of the asset sale agreement dated 29 June 2008. The WBC agreement had the following characteristics: (i) KMS/KDMS would be the technical partner of WBC by providing technical assessment for all new projects and execution after securing the new projects; (ii) TSLK was to be appointed as a purchasing agent to handle the purchasing of the raw materials including electronic components; (iii) KMS/KDMS must purchase all materials from TSLK to fulfil any purchase orders given by WBC; (iv) that Synergy was to be appointed as a manufacturer to manufacture all the goods to fulfil the purchase orders given by WBC; (v) The completed goods were then delivered by Synergy directly to WBC.

[8] USP has entered into a technical collaboration agreement dated 1 June 2007 with KMS. The USP agreement was supplemented with a letter dated 1 November 2007 to KMS informing KMS of the receipt of an award of a project to design and fabricate automated test and jig fixtures. In the same letter, USP expressed its desire that TSLK be appointed as its supplier of raw materials including electronic components. KMS/KDMS must purchase all materials from TSLK to fulfil any purchase orders given by USP.

[9] There was no written agreement between KDMS and NEE. To fulfil the orders from NEE, components were purchased by KDMS from TSLK. The products were purportedly to be manufactured by Synergy and delivered to KDMS in order to ship the same to NEE.

[10] As can be seen later, arising from the service business, the plaintiffs have suffered losses through two transactional schemes. These are:

(i) Fictitious Transaction Scheme

This is a scheme where the supply of goods was outsourced to TSLK and the manufacturing of the goods was outsourced to Synergy.

(ii) Inventory Sale Scheme

This is a scheme where the credit facility of RM35 million granted by Deutsche Bank to TSLK purportedly to finance the purchase of inventory from KDMS, but instead it was used to repay the debt owing by NEE to KDMS. The said RM35 million was secured by a guarantee by Kontron AG.

A [11] These two transaction schemes had caused huge losses to the plaintiffs. The fictitious nature of the service business was discovered by the plaintiffs after they had engaged the service of KPMG to conduct a forensic investigation.

The Plaintiff's Claim In Suit 710

- B [12] (i) Special damages in the sum of RM120,648,920.35.
(ii) General damages to be assessed.
(iii) 5% interest per annum on damages calculated from the date of filing of this action till full realisation.
- C (iv) Costs
(v) Any other relief deems fit by the court.

The Plaintiffs' Claim In Suit 714

- D [13] Against the first defendant
- (a) An order that the first defendant is liable to compensate the first plaintiff in equity for his breach of his fiduciary duty and equitable duty of fidelity to the first plaintiff;
- E (b) An account to the first plaintiff for the sums received by him which were secret profits received in fraud of the first plaintiff and an order for payment to the first plaintiff of all sums found due on the taking of the account;
- F (c) A declaration that the first defendant holds all sums received by him in fraud of the plaintiffs as resulting or constructive trustees for the plaintiffs;
- (d) An order that the first defendant reconstitute those assets which he holds on trust for the plaintiffs and deliver up of those assets to the plaintiffs;
- G (e) An order that the first defendant compensates the first plaintiff in damages for breach of contract of employment; and
- (f) Alternative to prayers (1)(a), (b), (c), (d) and (e) above, an order that the first defendant compensates the plaintiffs the sum of RM120,648,920.35 in damages for negligence.
- H [14] Against the fifth and eighth defendants
- (a) A declaration that the fifth and eighth defendants are liable to account to the first plaintiff as constructive trustees on the ground of knowing receipt of monies paid in breach of the first defendant's fiduciary duties and an order that the fifth and eighth defendants pay those sums found
- I due on the taking of the account to the first plaintiff.

- (b) A declaration that the fifth and eighth defendants hold all sums received by them in fraud of the first plaintiff as constructive trustee for the first plaintiff and are liable to account to the first plaintiff for the same and an order that the fifth and eighth defendants pay those sums found due on the taking of the account to the first plaintiff; and **A**
- (c) An order that the fifth defendant makes full restitution of monies under s. 70 and s. 71 of the Contracts Act 1950 paid by the plaintiffs on its behalf to Deutsche Bank, in the sum of: **B**
- (i) RM19,000,000 to the second plaintiff; and
- (ii) RM8,000,000 to the first plaintiff. **C**
- [15]** Against the second to the eighth defendants:
- (a) A declaration that the second to eighth defendants are liable to account to the first plaintiff as constructive trustee on the ground of dishonest assistance in breach of the first defendant's fiduciary duties; and **D**
- (b) A declaration that the second to the eighth defendants hold any commission, payment or profit received in respect of the dishonest assistance given to the first defendant on trust for the first plaintiff and is liable to account to the first plaintiff for the same and an order that they pay those sums found due on the taking of the account to the first plaintiff. **E**
- [16]** An order that the defendants are jointly and severally liable for damages to the plaintiffs in the sum of RM120,648,920.35 or such other sum as the court thinks fit for the tort of conspiracy. **F**
- [17]** General damages against the defendants to be assessed.
- [18]** In the alternative to the claims as per paras. 15, 16 & 17 above, the first plaintiff claims against:
- (a) The second defendant for payment of the sum RM22,657,000; **G**
- (b) The third defendant for payment of the sum RM19,993,462; and
- (c) The fourth defendant for payment of RM57,145,000.
- [19]** Interest at the rate of 5% per annum on the judgment sum from the date of the filing of this action until the date of judgment. **H**
- [20]** Interest at the rate of 5% per annum on the judgment sum from the date of judgment until full settlement of the judgment sum.
- [21]** Cost.
- [22]** Other reliefs deem fit by the court. **I**

A The Trial

[23] The trial of this case begins in 2013 and concluded in 2018. It took 102 days of hearing. There are 34 bundles of documents marked A to Z. The plaintiffs called 22 witnesses. Out of nine defendants, only three defendants ie Dr Sam, CG Quah and Anuar testify in court. The rest of the defendants ie WBC, USP, NEE, TSLK, Synergy and SG Lim did not give evidence. The notes of evidence running to 27 bundles and 102 volumes. The plaintiffs submitted that it is trite law that if a defendant fails to give evidence, the court is entitled to draw an adverse inference under s. 114(g) of the Evidence Act 1950 against the defendant. It is also submitted that the adverse inference had two effects ie the defendant's defence is deemed unsubstantiated and the plaintiffs' case is deemed unchallenged and accepted. In support of the submission, counsel for the plaintiffs cited *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751; *Pan Malaysian Pools Sdn Bhd v. Kwan Tat Thai & Anor And Other Appeals* [2018] 4 CLJ 323; [2017] MLRHU 1; *Chop Kim Lee Seng Kee v. Yea Kiat Jin* [1955] 1 LNS 19; [1956] 1 MLJ 67; *Chua Jui Meng v. Hoo Kok Wing & Anor* [2000] 6 CLJ 390; [2000] 3 MLJ 1 and *Malayan Banking Bhd v. Joseph Vijay Kumar A Arulnathan* [2011] 1 LNS 825; [2012] 9 MLJ 71. Based on the cited cases, I therefore invoke s. 114(g) of the Evidence Act 1950 and draw adverse inference against WBC, USP, NEE, TSLK, Synergy and SG Lim. The adverse inference against them would be the plaintiffs' claim stood unchallenged and the evidence of the plaintiffs' witnesses are deemed true and accepted.

The Issues

- [24] The three primary issues in this case are:
- (i) Whether the service business and the inventory sale scheme are fictitious transactions.
 - (ii) Whether Dr Sam and CG Quah are negligent as well as had breached their fiduciary duties to KDMS.
 - (iii) Whether the second to eighth defendants had conspired to injure the plaintiffs by unlawful mean.

Fictitious Transaction Schemes

Service Business

[25] There were many irregularities in the service business with WBC, USP and NEE. I shall deal with them under a separate headings as follows:

Formation Of Contract

[26] The facts revealed the process of selecting a customer and the formation of a contract is contained in the contract formation policy. Briefly, para. 7.1.4 of the contract formation policy laid down the procedure to be followed as follows:

- i) The business development personnel is required to first complete the business project authorisation (BPA) form and submit it to the top management for approval; A
- ii) BPA form is to be approved by top management;
- iii) After BPA is approved, then a draft contract agreement will be prepared and reviewed by the management for approval and then signed by the financial controller (CG Quah), the business development head (CW Hor) and Dr Sam (CEO) who are members of the top management. B
- iv) The top management of KDMS however did not approve any BPA form with respect of WBC, USP and NEE. C

[27] When cross-examined by the plaintiffs' counsel as to why the contract formation policy was not followed, CG Quah, CW Hor and Dr Sam blamed each other. CW Hor said he did not complete the BPA form because WBC, USP and NEE were service business and he does not handle the BPA Form for service business. CG Quah said it was CW Hor's responsibility to complete the BPA form and as it was not done, there is nothing for him to approve. So, he let it slip by. Similarly, Dr Sam blamed the business development department and CW Hor for failing to ensure that the BPA form for WBC, USP and NEE were completed. Now, despite there being no BPA form, Dr Sam and CG Quah have signed the WBC agreement and the USP agreement. As for NEE, there was no agreement signed at all. In cross-examination, Dr Sam states that the WBC agreement and USP agreement were merely technical collaboration and not an agreement or contract. Dr Sam said purchase order from WBC, USP and NEE is a contract. Dr Sam further said he has no duty to ensure that there should be an agreement for the sale and purchase with WBC, USP and NEE. His answer is to be tested against cl. 7.1.4.1 of the contract formation policy which states:

If BPA form approved by Top Management, a draft contract agreement will be submitted by KDMS (M) or customer, depending on customer's requirement. The contract agreement will be reviewed by management for approval. The contract agreement will be signed by a Financial Controller, Business Development & CEO/ President of KDMS (M).

[28] Based on cl. 7.1.4 of the contract formation policy, it is clear to me that Dr Sam has breached his duties by failing to ensure that the BPA form is completed before he signs the WBC and USP agreement.

Credit Term

[29] Paragraph 7.3.1.2 of the credit control policy states:

- i) The payment term prescribed for KDMS's customers by the credit control policy is within 30 days from the invoice date; and I
- ii) In principal, payment term of net 30 days shall apply to all customers.

- A [30] Under Dr Sam and CG Quah's supervision, KDMS had given its customers, WBC, USP and NEE between 75 days to 90 days credit term.
- B [31] Although credit term of more than 30 days is allowed, it requires approval. The procedure in place is the business development must first complete the credit evaluation form for the approval of business development director (CW Hor), CEO (Dr Sam) and financial controller (CG Quah) before KDMS can extend the payment term of a customer.
- [32] No such approval was obtained for WBC, USP, NEE and TSLK. Yet, WBC, USP, NEE and TSLK were granted credit term beyond 30 days.
- C [33] Whilst the customers were granted credit term of 75 to 90 days, KDMS's term of payment to its supplier, TSLK was cash on delivery.
- [34] Both Dr Sam and CG Quah have knowledge of this arrangement with TSLK as they have signed off payments to TSLK.
- D [35] Such arrangement meant TSLK is always paid first. And payment from customers came in very much later, after 75 to 90 days. This resulted in KDMS will always be out of cash before receiving payment from WBC, USP and NEE. This mismatch of payment term is also pointed out by KPMG in its report.
- E Customers And Supplier Lack Financial And Operational Capabilities
- [36] It is not disputed that Dr Sam and CG Quah did not conduct any background check on the customers and supplier. As it turns out, the customers and supplier had no funds and capabilities to support the fictitious transaction scheme. This is evident from the following facts.
- F (a) WBC
- | | | |
|--------------|---|----------|
| Total assets | – | RM5,623 |
| Revenue | – | RM57,860 |
| Profit | – | RM4,321 |
- G
- (b) USP
- | | | |
|--------------|---|-----------|
| Total assets | – | RM829,771 |
| Revenue | – | RM0 |
| Profit | – | RM0 |
- H
- (c) NEE
- There was no detailed financial data of NEE available.
- I

[37] However, the size of the purchase orders of the customers were as follows: **A**

(a) WBC issued a single purchase order of RM65,000,000.

(b) USP issued five purchase orders for goods:

i) RM5,195,000 **B**

ii) RM2,169,000

iii) RM5,195,000

iv) RM5,195,000 **C**

v) RM5,225,000

(c) NEE issued 11 purchase orders for goods:

i) RM5,195,000

ii) RM5,195,000 **D**

iii) RM5,195,000

iv) RM5,195,000

v) RM5,195,000

vi) RM5,195,000 **E**

vii) RM5,195,000

viii) RM5,195,000

ix) RM5,195,000 **F**

x) RM5,195,000

xi) RM5,195,000

[38] When a comparison is made between the revenue and the amount of purchase, it is impossible for WBC, USP and NEE with a revenue less than RM100,000 are capable of paying a single purchase. **G**

[39] In addition, there was evidence that from the site inspections conducted by KPMG at the addresses of WBC, USP, NEE, TSLK and Synergy revealed none of them had the capability of operating any manufacturing and none of them appear to be carrying out any business activities. **H**

[40] For the suppliers, TSLK and Synergy, their financial status are as follows:

I

- A (a) TSLK
- (i) two pieces of land that has been sold and pending discharge with a sale value of RM6,200,000.
 - (ii) Outstanding loan of RM5,000,000.
- B (iii) Private caveat lodged for debt of RM1,200,000.
- (iv) Overdraft facility that has been fully utilised with an amount owing RM1,000,000
 - (v) Total balance in bank account less than RM3,000.
- C (b) Synergy
- Total assets – RM30,801
 - Total liability – RM134,150
- D Revenue – RM611,383
- Profit – RM28,661

[41] The site inspection done on TSLK's premises disclosed:

- E (i) For TSLK's business address at No. 32, Lebuah Lembah Permai 4, Tanjung Bungah, 11200 Pulau Pinang on 11 August 2010, a pub and café named "Cheers @ 32" was occupying the unit on the ground floor. Access to the first floor was locked. There were no signs indicating TSLK was occupying any of the two floors. There is only one empty mailbox for the said premises with detail of the address, but not the name of TSLK. It appears that TSLK did not exist in the said premises.
- F (ii) For TSLK's address at 9837-A, Prima Tanjung Complex, Jalan Fettes, 10470 Penang on 11 August 2010, the premises are located in a commercial building. There was no listing of TSLK at the building directory. The ground floor of the building directory indicates that the unit was being occupied by APY Technologies Sdn Bhd. The address of TSLK was located on the third floor, but it was being occupied by a company named "Senpohenix Network". The main door of the said unit was closed with no business activity in all the units located on the third floor. Hence, it does not appear that TSLK has any presence in the said premises. In the final analysis, it does not make commercial sense that TSLK, being a company with less than RM3,000 in the bank with zero assets and no business premises is capable to supply RM107,814,088 worth of materials without factory, warehouse and machineries.
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[42] The site inspection done on Synergy revealed:

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- i) The address, No. 1-3-55, 1 Avenue, Medan Kampung Relau 1, Bayan Lepas, Pulau Pinang is located at a commercial building. There was no signage and business activity at the entrance of No. 1-3-55. The size of the unit which is approximately 300sq feet and its location proved it is impossible for Synergy to operate any manufacturing process.

B

Unusual Process In The Service Business

[43] Based on the evidence of BC Pung (PW3) at Q & A No. 5 and Sukdev (PW8) at Q & A No. 23, the general processes involved under a usual or normal transaction are:

C

- (i) Customers will send their orders to the Business Development Department and the customer orders will then be entered into JDE system.
- (ii) The purchase requisition will be created and approved for the required materials and components to be purchased to manufacture the goods to fulfil the customer's purchase order.
- (iii) KDMS would then issue purchase orders to its suppliers to purchase materials and components.
- (iv) The suppliers would deliver the materials and components to KDMS with the delivery order.
- (v) After manufacturing the goods, KDMS would deliver the products to the customer.
- (vi) KDMS will then issue an invoice directly to the customer.

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[44] But, for the service business involving WBC, USP and NEE, KDMS acts as an intermediary for the customer and supplier. KDMS does not manufacture or supply any goods to the customers. KDMS's role is limited to only paying the suppliers for the goods that were supposed to be delivered by them to the customers directly. The process involved in the service business was as follows:

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- (i) WBC, USP and NEE will send their orders to Dr Sam. Dr Sam then passes them personally to Business Development or Finance Department.
- (ii) There was no entry in the JDE system of the customer orders. The customer orders were manually processed.
- (iii) Finance (usually Pung Bee Cheng) will then receive quotations, invoices and delivery orders directly from TSLK/Synergy which will correspond with the customer orders.

H

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- A (iv) Finance will send TSLK's and Synergy's quotations to Business Development who will then pass them to the PR administrator, Ong Poh Lin.
- (v) The PR administrator then raises the purchase requisition (PR) by entering the relevant information like the quantity and the description of the goods into the JDE system.
- B (vi) The PR will be routed to NY Chang from Business Development Department for approval, followed by CG Quah. It will finally be approved by Dr Sam, or in his absence, Patrick Ooi.
- C (vii) Once the PR is approved, then it will be routed to the Purchasing Department and they will then raise the KDMS purchase orders to the suppliers based on the PR.
- (viii) Thereafter, the suppliers were supposed to deliver the products. For example, Synergy will deliver the products directly to its customer, WBC. TSLK will deliver its products directly to USP. Synergy delivers its products to KDMS for NEE's orders.
- D (ix) The suppliers then issue invoices to KDMS and these invoices will be paid on the same day or sometimes even before the invoices were issued.

E

Unusual Sequence Of Documents

[45] In a normal sale and purchase transaction, the customers must first place their orders before the suppliers issue their invoices and delivery orders. This process is bypass or not followed in the transactions involving WBC, USP and NEE. In fact, the transaction was done in topsy-turvy or sloppy manner. This can be seen in the following examples:

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(a) KDMS issued its Purchase Order No. 9713300 for RM507,880 to TSLK on 18 March 2009. TSLK then issued its invoice and delivery order for PO No: 9713300 on 17 March 2009, one day before KDMS placed the order.

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(b) KDMS's purchase order to TSLK was issued on 13 November 2009. But TSLK issued its invoice and delivery order on 4 November 2009, nine days before KDMS placed its order.

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[46] In a normal transaction, the reference numbers of purchase orders issued by a customer must run sequentially, in that earlier customer order should have a smaller reference number than the later customer's order. But, in the transaction involving WBC, USP and NEE, there is no sequential. Instead, the reference number is upside down.

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[47] In normal transaction, when KDMS issues its invoices, the reference numbers for the invoices will usually run sequentially, in that an earlier invoice should have a smaller reference number than the later invoice. Again, for the transactions involving WBC, USP and NEE, the reference numbers are not sequential and not systematic.

A

[48] It is an established fact that the customer's purchase orders and KDMS's invoices were manually processed to suit with the available cash flow of KDMS, not the supply of goods.

B

[49] The extent of KDMS's money being used to fund these transactions is described below:

C

- (i) KDMS own banker acceptance facility is being used to fund the transaction leaving a huge risk for KDMS if the customer does not pay.
- (ii) KDMS had to rely on the customer's payment to settle KDMS's banker acceptance facility that was used to finance the transaction.
- (iii) Right on the same day or next day when payment is made by the customer, TSLK will issue an invoice for a new batch of goods which result in KDMS's banker acceptance facility being drawdown immediately again to pay TSLK.
- (iv) Based on KPMG's investigation at para. 4.1.2.13 of the KPMG report at p. 41 of bundle G1, there are instances where TSLK made payments for and on behalf of WBC, USP and NEE to KDMS.

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[50] One of the key features of the fictitious scheme is TSLK is paid immediately. In fact, there are two occasions where payments were made to TSLK prior to an invoice being issued by TSLK. By paying TSLK immediately, it allowed new order to be placed by the customer. However, with the combination of several orders, the amount owing by the customers becomes larger and results in more new purchase orders are placed to make KDMS pay out more money to TSLK. This resulted in the sum of RM99,795,462 being owed as account receivables by WBC, USP and NEE.

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[51] Synergy's ten delivery orders contain identical reference numbers as set out in para. 4.1.2.3 of the KPMG report at p. 33 of bundle G1. It is also reported that Synergy's quotations, delivery orders and invoices were forwarded to KDMS Finance for processing by S.G Lim. Such process deviates from the normal practice that different supplier processes its own documents.

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[52] The most crucial feature in the fictitious transaction is there was no actual delivery of goods. It was all paper transactions to siphon KDMS' money.

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A [53] From the above irregularities, abnormality, nonsensical way the service business were carried out with WBC, USP and NEE, there is only one conclusion that I can make and that is the transactions were fictitious. They were only paper transactions to pump out KDMS' money.

Inventory Sale Scheme

B [54] The inventory sale scheme is known in the manufacturing industry as vendor managed inventory (VMI). Dieter Gauglitz explained how VMI was carried as follows:

C Basically from what was explained by Dr Sam and CG Quah, TSLK was experienced in managing inventory for companies as they are also a component supplier. Hence, KDMS would offload its inventory to TSLK and purchase it from TSLK as and when it needs.

D I was only involved in decisions about financing working capital and improving working capital for liquidity. The decision whether to do a VMI is a purely operation matter and has to be decided by the responsible local management of KDMS and operations manager at Kontron AG.

I understand that TSLK was desired inventory partner of the local managers Dr Sam and CG Quah.

E [55] In previous VMI transactions between KDMS and TSLK, KDMS was never paid and instead what was owed to KDMS was set off when KDMS purchased its inventories back from TSLK. But, the inventory sale on 30 September 2009 was the first time that KDMS will be fully paid when its inventory was sold to TSLK. As can be seen later, the plaintiffs are not complaining about the VMI. But, the complaint is the fraudulent manner the VMI was carried out which caused losses to the plaintiff.

F [56] The purported inventory sale scheme was done in the following manner:

- (i) On 30 September 2009, KDMS sold its inventories to TSLK.
- G (ii) TSLK paid KDMS for the inventories through its RM35 million credit facility that TSLK obtained from Deutsche Bank *via* a letter of offer dated 30 September 2009.
- (iii) TSLK credit facility was secured by a corporate guarantee issued by Kontron AG in favour of Deutsche Bank.
- H (iv) TSLK's credit facility was drawdown on 30 September 2009 to pay KDMS and the proceeds were banked into KDMS's account on 30 September 2009.
- (v) TSLK defaulted to repay its own credit facility with Deutsche Bank.

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- (vi) As TSLK had defaulted its repayment obligation to Deutsche Bank, Kontron AG was at risk of being called by Deutsche Bank to answer on its corporate guarantee. A
- (vii) To avoid the call upon the corporate guarantee, Kontron AG made payment *via* KDMS to settle the amounts RM27 million owed by TSLK. B
- (viii) The payment of RM27 million by the plaintiffs towards settlement of TSLK credit facility was confirmed by Deutsche Bank's witness (PW20).
- [57] The first impropriety noted in this inventory sale scheme is there was no signed inventory sale agreement between KDMS and TSLK. It is pertinent to note that in a previous inventory sale transaction, Dr Sam had signed an inventory sale agreement. C
- [58] The most glaring impropriety is the unusual application of the sales proceeds in the inventory sale scheme when: D
- (a) Instead of entering RM35 million to KDMS as proceeds of sales, Dr Sam/CG Quah entered RM35 million as amount paid to set off the debts of NEE with KDMS. This resulted in wrongful deduction of NEE's existing debt with KDMS in the accounting entries of KDMS. E
- (b) In addition to the above, KPMG discovered that the invoice number RZ9000340 for the inventory sale had the same reference number with another invoice which was for the sale of scrap in an amount of RM1,539.25 to an entity called "Ming Engineering Plastic Sdn Bhd".
- (c) There was no sale of inventory recorded in KDMS accounts despite having issued an invoice for the sale and received the payment for the sale. F
- (d) Dr Sam admitted there was no sale of inventory in his witness statement at Q & A No. 41 where he said: G
- The 2nd plaintiff further gave a secured corporate guarantee to Deutsche Bank (M) Bhd dated 30.9.2009 to make available credit facilities or other financial accommodations to TSLK Enterprise Sdn Bhd. The Guarantee was for the objective of securing the purchase of KDMS inventory, which did not happen and yet money was paid into the 1st plaintiff's account and booked into AR of NEE. H
- (e) Based on the event transpired, it is a proven fact that there is actually no inventory sale taken place. It is a scam to cheat the plaintiffs' money. This is evident when Dr Sam issued a fictitious invoice No. R29000340 I

A for TSLK to draw down the RM35 million credit facility with Deutsche Bank. For this reason, I hold the purported inventory sale scheme was a fictitious transaction.

B (f) One issue raised by the plaintiffs is despite TSLK did not request the plaintiffs to settle TSLK's debt with Deutsche Bank, the plaintiffs still had the rights to be repaid as a guarantor. Counsel for the plaintiffs refers me to the Canadian Supreme Court case of *Drager v. Allison* [1959] SCR 661, where it was held:

C A surety who pays the guaranteed debt in relief of the principal debtor before the debt has become legally due and without any request from the debtor does not thereby lose his right of action altogether by becoming mere volunteer. If no gift is intended as in the present case although he cannot accelerate his remedy, he may nevertheless ultimately assert his remedy at the time when the guaranteed debt should ordinarily have been paid.

D [59] In the present case, the payment of RM27 million by the plaintiffs to Deutsche Bank was NEVER EVER intended as a gift. In fact, the said sum of money was paid to avoid Kontron AG from being blacklisted by Deutsche Bank. The facts show the plaintiffs were put in unnecessary problems due to unscrupulous conduct of the defendants. Surely, TSLK cannot gain any benefit from its own wrongdoing. TSLK owed the plaintiffs RM27 million.

E TSLK is therefore liable to repay this sum to the plaintiffs. Accordingly, I allowed the plaintiffs' claim for the sum of RM27 million against TSLK.

Dr Sam's Negligent And Breach Of Duties To KDMS

F [60] Based on documents, emails, SMS, facts and evidence, it is inescapable that Dr Sam was grossly negligent and had acted in breach of his duties as a CEO and director of KDMS. As mentioned earlier under the heading of fictitious transaction, Dr Sam's negligent is primarily premised on his deliberate omission to comply with the company's policy and procedure. In particular, he had failed:

- G (i) To ensure that a written agreement was executed between KDMS and NEE in compliance with cl. 7.1.4.1 of the contract formation policy.
- H (ii) To ensure that BPA form was submitted by Business Development Department and approved by the top management before the USP agreement and WBC agreement was executed.
- (iii) To ensure that the credit limit under the policies of KDMS/KMS were adhered to in relation to the transaction of KDMS with WBC, USP and NEE.

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- (iv) To ensure that proper due diligence and verification were conducted on WBC, USP, NEE, TSLK and Synergy regarding their financial and operational capabilities. A

[61] From the various irregularities the business transactions were carried out by KDMS with WBC, USP, NEE, TSLK and Synergy, I agree with the plaintiffs that Dr Sam as the CEO had conducted the business of KDMS in a manner detrimental to the plaintiffs. This is so glaring when he: B

- (i) Fail to raise enquiries despite the numerous discrepancies and inconsistencies in the purchase orders, invoices and delivery orders.
- (ii) Fail to ensure that the business transactions between KDMS with WBC, USP, NEE, TSLK and Synergy were carried out in accordance with KDMS's policy and procedure. C
- (iii) Continuing to allow WBC, USP and NEE to place orders with KDMS despite these companies had substantial unpaid invoices. D
- (iv) Fail to recover outstanding account receivables from WBC, USP and NEE.
- (v) Fail to recover from TSLK the RM27 million paid by the plaintiffs in settlement of TSLK's credit facility with Deutsche Bank.
- (vi) Fail to give a full and frank disclosure of the true nature of KDMS business with WBC, USP NEE, TSLK and Synergy to the board of directors of KDMS and Kontron AG. E
- (vii) Allowing S.G Lim, a stranger to have an office in KDMS and at the same time giving instruction to KDMS's staff. F

[62] In addition to the above, I also agree with the plaintiffs that Dr Sam had breached his fiduciary duties to KDMS when he:

- (i) Approved the purchase orders to TSLK when he knew there were no real goods produced and delivered by TSLK and Synergy. G
- (ii) Authorised payments made to TSLK when he knew the payments were for fictitious transactions.
- (iii) Procure the transfer of the monies of KDMS paid to TSLK to his personal accounts or to third parties for his own benefit.

[63] During the trial, Dr Sam had raised the following defences: H

- (i) He had relied fully on business development and finance on matters relating to WBC, USP, NEE, TSLK and Synergy;

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- A (ii) He does not need to supervise his employees; and
(iii) The plaintiffs had approved the fictitious scheme and the inventory sale scheme.

B [64] Apparently, Dr Sam is not aided by law in all his three defences. The law says Dr Sam as a director had a duty to supervise the people working under him. On this point, counsel for the plaintiffs refers me to the English case of *Re Barings plc and Others (No. 5)* [1999] 1 BCLC 433 at 436, where the court said:

C Whilst directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated function.

D [65] Another case referred to by the plaintiffs to me is the Singapore Court of Appeal case of *PlanAssure Pac formerly known as Patrick Lee Pac v. Gaelic Inns Pte Ltd* [2007] 4 SLR 513. In that case, the court observed:

E A director cannot now be viewed as mere sentinel who may occasionally doze off at his post. Directors are officers who must remain alert and watchful at the helm. Directors ought to have an inquiring, though not necessarily suspicious, mind in discharging their supervisory function.

[66] The final case referred to by the plaintiffs is the Singapore Court of Appeal case of *Ho Kang Peng v. Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 where the court said:

F [44] In our view, it does not lie in the mouth of a man who was the CEO of the company to deflect his duty to exercise reasonable diligence by arguing that he was simply following what was told to him by subordinate officers of the company to be an established practice, especially in relation to a payment of the kind such as the present which is *prima facie* improper and indeed illegal.

G [67] The above-quoted cases clearly established the law that a director and a CEO of a company had a duty to supervise his subordinates. In denying he had such a duty, Dr Sam seems to suggest that his duty is merely to receive a salary and then gave instructions to his subordinates to handle everything whilst he closed his eyes to all the absurdities. At this juncture, I must stress that Dr Sam is not only highly qualified, he was highly paid. His salary is RM42,972. It is unthinkable that with such a high pay, Dr Sam has no responsibility at all in KDMS. In *Re Barings plc and Others (No. 5)* [1999] 1 BCLC 433, the English Court had this to say:

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Where there is an issue as to the extent of a director's duties and responsibilities in any particular case, the level of reward which he is entitled to receive or which he may reasonably have expected to receive from the company may be a relevant factor in resolving that issue. It is not that the fitness or otherwise of a respondent depends on how much he is paid. The point is that the higher the level of reward, the greater the responsibilities which may reasonably be expected (*prima facie*, at least) to go with it. As Sir Richard Scott V-C said when making a disqualification order in respect of Mr Maclean (see *Re Barings plc, Secretary of State for Trade and Industry v. Baker* [1998] BCC 583 at 586):

[Counsel for the respondent] made the point that if an efficient system is in place, or if the individual in question has good reason for believing there to be an efficient system in place, the delegation within the system of functions to be discharged in accordance with the system by others cannot be the subject of serious criticism if, in the event, the persons to whom responsibilities are delegated fail properly to discharge their duties. That may be so up to a point in theory, but the higher the office within an organization that is held by an individual, the greater the responsibilities that fall upon him. It is right that that should be so, because status within an organization carries with it commensurate rewards.

These rewards are matched by the weight of responsibilities that the office carries with it, and those responsibilities require diligent attention from time to time to the question whether the system that has been put in place and over which the individual is presiding is operating efficiently, and whether individuals to whom duties, in accordance with the system, have been delegated are discharging those duties efficiently.

[68] Applying the above law to the facts of this case, I hold that Dr Sam as the CEO of KDMS had a responsibility to ensure the business of the company is carried out properly with the best interest of the company in mind. He is presumed to know all the company's policy and procedure and is expected to strictly abide them. It is his duty to check, verify and ensure the entire process of securing a customer, supplier and manufacturer is done in accordance to the standard set up by the company. It is of utmost importance for him to observe that there are no irregularities in the purchase orders, invoices, delivery orders and payments because the transaction involved paying out millions of ringgit of the company's money. It is his duty to query his subordinates and prevent any harm being done to the company. All these were not done by Dr Sam. Instead, it is my finding that Dr Sam is a champion who instruct his subordinates to ignore the company's policy and procedure. An honest, careful and diligent CEO in Dr Sam's shoe would not do what Dr Sam did. By his conduct, Dr Sam had breached his fiduciary

A duty and/or terms of his employment contract. Because of his negligence, breach of duty and misconduct, the plaintiffs have suffered losses. Therefore, he is liable to make good the losses suffered by the plaintiffs.

[69] In answer to Dr Sam's third defence, again I was referred to an English case of *SA v. Bilta (UK) Limited (in liquidation)* [2015] UKSC 23 wherein the English Supreme Court held:

B ... Where a company has been the victim of wrongdoing by its directors, or of which its director had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrong-doing, even where the directors were the only directors and shareholders of the company, and even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings.

C [70] In the present suits, the plaintiffs had no knowledge about the fictitious transactions. KDMS and Kontron AG were under the impression that the transactions with WBC, USP, NEE, TSLK and Synergy and the inventory sale scheme were done genuinely and in accordance with the company's policy and procedure. As being found by this court, the entire fraudulent transactions were invented and carried out by Dr Sam and his gang. The plaintiffs are the victims of Dr Sam's deceit. Based on the above-cited case, Dr Sam's defence that the plaintiffs' company is to be blamed must fail.

[71] Moving on to the plaintiffs' case against CG Quah.

CG Quah's Negligent And Breach Of His Fiduciary Duties To KDMS

F [72] CG Quah was defensive and evasive in his testimony. He did not deny the inconsistency in the purchase order, invoices and delivery orders. He agreed that the transactions with WBC, USP and NEE were fraudulent. He knew the company's policy on selection of customers, the credit evaluation and payment terms were not complied with. Despite knowing all these shortcomings, CG Quah as the financial controller of KDMS did nothing to stop the outflow of KDMS's money to TSLK. His defences are:

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- (i) WBC, USP and NEE were acquired directly by Dr Sam.
 - (ii) The terms of contract for WBC, USP and NEE were discussed, negotiated and agreed to by Dr Sam. He was not involved in the service business.
 - (iii) His responsibility did not include conducting customer's background.
 - (iv) As for credit term, it was decided by Dr Sam.

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- (v) As the financial controller, he worked under strict instruction of Dr Sam and any issue must be reported to Dr Sam. A
- (vi) He was never instructed by KDMS to fill up BPA form until the month of April 2010.
- (vii) He was never involved in the purchase of materials from TSLK. B
- [73]** CG Quah denied he had breached the terms of his employment contract. His reasons are:
- (i) He was never certain that the transactions with WBC, USP, NEE, TSLK and Synergy from 18 December 2009 until 20 January 2010 were fictitious. C
- (ii) It is not his responsibility to make investigation on TSLK.
- (iii) Monthly statements for transaction with WBC, USP and NEE were sent to Kontron AG. D
- (iv) The plaintiff's board of directors have full knowledge about the payment of RM8 million under the guarantee signed by Kontron AG.
- (v) Even though he was appointed as senior financial controller, he was never informed or invited to attend any Board of Directors Meeting. Therefore, it is not possible for him to disclose material facts to the Board or to give the Board an accurate account of the plaintiffs' business. E
- (vi) He feared Dr Sam because Dr Sam is his boss who always overrides him. His rice bowl depended on Dr Sam's appraisal at the end of the year.

[74] I find there is no merit in CG Quah's defence for the following reasons. CG Quah is one of the top management personnel in KDMS. He is the custodian of KDMS's money. Yet, despite knowing there are so many irregularities in the purchase orders, invoices, delivery orders and that WBC, USP and NEE had failed to make payments to KDMS, he dare not stop payment to the supplier, TSLK. The concern of this court is why CG Quah continue approving payments to TSLK despite the obvious. Even if it is true that it is not his duty to investigate, surely he cannot approve payments for millions of ringgit blindly also. He cannot even tell Dr Sam that he cannot approve payment to TSLK because the transaction is fraudulent. All for a simple reason that he only cares for his rice bowl and he was afraid of Dr Sam. In *Zaharen Hj Zakaria v. Redmax Sdn Bhd & Other Appeals* [2016] 7 CLJ 380; [2016] 5 MLJ 91, the Court of Appeal held:

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- A [45] But the law does not impose absolute duty to obey in all situations. Only lawful and reasonable directives or instructions must be obeyed by the subordinate. Definitely instructions given which are dubious and plainly unlawful, ought not to be obeyed to the tee, if at all. To do so would in fact make a subordinate an accomplice. The law does not impose
- B such an onerous duty on an employee in the discharge of his obligations to his employer. As such, with such a duty of fidelity, blind loyalty and subservience to a superior's instructions cannot be condoned. Such a defence could not hold water, much less be sustained, definitely not in the circumstances obtaining in this appeal before us.
- C [75] Based on *Zaharen's* case, CG Quah's defence that he was merely carrying out his boss instruction cannot hold water. In addition to this, I also find CG Quah is negligent when he:
- (i) Failed to disclose Anuar's emails dated 30 September 2009 and 1 October 2009 to Kontron AG and KPMG.
- D In the email dated 30 September 2009 (p. 115 of bundle Z), Anuar wrote to CG Quah:
- E From my point of view, TSLK is the only company that 100% controlled by dr sam. He own it behind the scene. I can say 30% – 40% sg lim. They transferred their money out of country thru Kassim Forex to ICBC, Kowloon, Hong Kong almost every month. This money is 100% from Kontron ...
- [76] In the email dated 1 October 2009 (p. 114 of bundle Z), Anuar wrote to CG Quah:
- F ... TSLK is well planned, as I mentioned to you that day, my name will appear as shareholder but it's only RM1.00. You can never see Dr Sam's name there, their *modus operandi* is that sg lim will issue a cheque to Kassim Forex, the amount will be bank in straight to Dr Sam's account in ICBC, Kowloon, Hong Kong or elsewhere (if any). That's dr sam cut ...
- G The flow of money can be traced thru their account only NOT the documents.
- Lim is championing on the projection of monetary trench & Dr Sam on the documentation. Their collaboration is perfectly done. Maybank just approved facility to sg lim amounted to almost RM5M ...
- H [77] From these two emails, as early as end of September 2009, CG Quah knew about Dr Sam and SG Lim's involvement in TSLK. CG Quah should have taken the emails as red flag and immediately informed Kontron AG about it. Had he done so, the fraudulent transactions could have been discovered earlier. This he failed to do. CG Quah also had failed to inform
- I KPMG about these emails for KPMG to conduct investigation. His conduct in treating the emails lightly and not doing anything has contributed to the losses suffered by the plaintiffs.

- (ii) The plaintiffs would not have suffered losses for the inventory sale scheme if:
- (a) CG Quah had refused to allow Dr Sam and SG Lim to draw on the RM35 million credit facility. Had he done so, the facility to TSLK would not have been drawn and there would be no obligation for the guarantor to pay. A
 - (b) CG Quah did not wrongly allocate the RM35 million received from the sum disbursed to pay amount owing by NEE, there would not have cash flow for Dr Sam and other defendants to cause KDMS to continue the fictitious transaction scheme in December 2009 by paying TSLK. B
- C

[78] On the facts and circumstances of this case, it is without doubt that CG Quah was negligent and had breached his fiduciary duties to the plaintiffs. By his conduct, CG Quah had facilitated the fictitious transactions. Therefore, he is liable for the losses suffered by the plaintiffs. D

Conspiracy To Injure

[79] The basis upon which the plaintiffs say all the defendants in Suit 714 had conspired to injure the plaintiffs is the creation of fictitious transactions with customers and suppliers of no capability to pay or supply. In *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676; [2016] 3 MLJ 797, the Court of Appeal states four elements must be present to make out a tort of conspiracy to injury. They are: E

- (i) a combination or agreement between two or more individuals; F
- (ii) an intent to injure;
- (iii) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and
- (iv) resulting loss and damages to the claimant. G

[80] In the present case, without a need to repeat the facts, I can easily say that the two defendants who must have had an agreement to carry out fictitious transactions are none other than Dr Sam and SG Lim. They are both the mastermind and *alter ego* behind TSLK. Like SG Lim, Dr Sam has an interest in TSLK. Both of them work hand in glove. Although TSLK was supposed to be the supplier, but at the same time TSLK also made payments on behalf of the plaintiffs' customers. Such an arrangement is weird and not known to exist in any normal commercial transactions. This ludicrous method of carrying out business transactions in itself indicates the transaction is fraudulent. There is no doubt that TSLK was used as a vehicle to wipe off H

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- A the plaintiffs' money. In all, the total sum paid to TSLK for the fictitious transactions is RM93,698,328 and the payment made by KDMS and Kontron AG to Deutsche Bank (again for the benefit of TSLK) is RM26,950,592.35. From the facts and evidence, Dr Sam always gives special preference to TSLK. Not only that, Dr Sam also give a VIP treatment to SG Lim. It must have been a mutual agreement between SG Lim and Dr Sam that Dr Sam is to bypass the plaintiffs' policy and procedure to the extent his subordinates cannot say "No". Without Dr Sam breached his duty to the plaintiffs, there can never be a tort of conspiracy to injure by unlawful means. On the facts, I am satisfied that the plaintiffs have made out a case of tort of conspiracy to injure against all the defendants. Accordingly, they are all liable to the plaintiffs.
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The Plaintiffs' Losses

[81] The total losses suffered by the plaintiff is stated below:

D	(i) Fictitious Transaction Scheme	
	Losses	Amount
	Transaction involving NEE	RM55,000,000
	Transaction involving WBC	RM19,534,328
E	(RM29,634,328 less RM10,100,000 received as part payment for KDMS invoice dated 25 February 2009)	
	Transaction involving USP	RM19,164,000
F	(RM22,164,000 less RM3,000,000 received as part payment for KDMS invoice dated 4 November 2009)	
G	Total paid by KDMS to TSLK for the above Transactions	RM93,698,328
	(ii) Inventory Sale Scheme	
	Losses	Amount
H	Payment made by KDMS to Deutsche Bank	RM8,000,000
	Payment made by Kontron AG to Deutsche Bank	RM19,000,000

I

Conversion loss	RM1,500,592.35	A
Less RM1,550,000 being three payments made on 5 February 2010, 24 February 2010 and 19 March 2010	RM1,500,000	
Total	RM26,950,592.35	B
The grand total loss is RM93,698,328 + RM26,950,592.35 = RM120,648,920.35		

Decision

[82] There are overwhelming evidence before the court for me to come to a decision that the plaintiffs have proved their case against the defendants in both suits. Accordingly, I enter a judgment for the plaintiffs in both suits and make the following orders:

(i) Suit 22-710-2010

Judgment is entered for the plaintiff for prayer 17(1), (3) and (5) of the statement of claim. CG Quah is to pay to the plaintiff the sum of RM120,648,920.35 together with 5% interest thereon calculated from the date of filing of this action until full satisfaction.

(ii) Suit 22-714-2010

(a) Against the first defendant (Dr Sam)

The first defendant is to pay to the plaintiffs the sum of RM120,648,920.35 as damages for negligence and breach of fiduciary duties.

(b) Against the second to eighth defendants

The defendants are jointly and severally liable to pay damages in the sum of RM120,648,920.35 to the plaintiffs for the tort of conspiracy. The defendants are also liable to pay interest of 5% per annum, calculated from the date of filing of this suit until full satisfaction.

(c) The defendants in both suit 22-710-2010 and 22-714-2010 are jointly and severally liable to pay costs of these actions in the sum of RM180,000 to the plaintiffs.